93-957

FILED
DEC 14 1993
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No.----------

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

KALYANA RAMASWAMI - PETITIONER.

Vs

TEXAS DEPARTMENT OF HUMAN SERVICES
FRANCIS SUDELA
VERNA MAINPRIZE
MARLIN JOHNSTON

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

KALYANA RAMASWAMI.
(PRO SE}
14802 PAYETTE DRIVE
HOUSTON, TX-77040-2920.
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139 pp

QUESTIONS PRESENTED.

1. Whether the interest of justice and Right to Due Process are served by the dismissal of appeal as not timely, by Court of Appeals on their own motion, after denying the Plaintiff's motion for substitution of counsel provided at the District Court for proper further prosecution of the case, when the Judicial Council of Fifth Circuit Plan under the Criminal Justice Act provides for continued Representation on Appeal and the Civil Rights Act of 1964 also provides for Attorney representation ?

2. In Title VII complaints, where it has been recognized that Courts should not dismiss an action based solely on mere technicalities, Does not, the denial of this appeal based on technicalities in conflict with the same Appeals Court earlier judgement that " Procedural technicalities are not to stand in way of complaints under Title VII of the Civil Rights Act of 1964." Sanchez V Standards Brands Inc., 431 F 2d 456, 1970. (5th Circuit), particularly when there was no trial and discovery for and on behalf of the Plaintiff and summery judgement on deemed admissions was disputed on majority of the items ?

3. If both the March 17, 1992, District Court orders were final and appealable on March 17, 1992, Why did the Amended order of May 13, 1992, was issued unless it was not in response to Plaintiff's Motion for reconsideration made on April 14, 1992, particularly when no other papers were filed or pending with the Court from the date of the final order of March 17, 1992 to May 13, 1992, the date of the Amended Order and the Court has not stated any specific reasons for issuing the Amended Order ?

Whether the District Court committed a clear error in responding to the Plaintiff's motion for reconsideration and by

not specifically stating that the May 13, 1992 order was in response to the Plaintiff's Motion for reconsideration ?

4. When the District Court appointed a counsel to the plaintiff, knowing that he did not understand the legal procedures and became a victim of deception to the defense counsel, and the court appointed counsel did not discharge the duties responsibly and on that score the court issued a summery judgement and dismissed the case while the court appointed counsel declined to pursue the case on appeal and other responsibilities and when plaintiff informing this matter

made a motion for a substitute counsel which, the district court denied after a month and half without assigning any reasons, ultimately resulting in the denial of the appeal also,
Did the plaintiff get due process of law and a fair hearing on the Title VII complaint as envisaged in the Civil Rights Act of 1964 ?

5. Whether the Appeals Court Orders denying Appellant's Motion for :

a. Supplementing the Appeals Court records substantiating with facts and factual evidence for every item of the summery

judgement disputed, for the charge of discrimination filed with the E.E.O.C. and for the employment discrimination complaint filed with the District Court and

b. Alternative method of designating the contents of the Appendix in accordance with the F.R.A.P.

serves the cause of justice and fairness, complies with the due process requirements of the constitution, the enforcement of the Civil Rights Act of 1964 and Federal Civil Procedure ?

(Appendix B 3 & 4)

6. Whether the summery judgement obtained through deception and misrepresentation by the Attorney General of Texas, who has the responsibility for filing civil action against the officials of a government agency both under the Federal and Texas State Laws, who also enforces Texas State Deceptive Trade Practices Act and a member of responsible profession is valid and meets the standards of justice, fairness and due process ?

Also whether it is appropriate for the Attorney General of the State of Texas to use the unreasonable sanction money collected from the Pro-Se plaintiff as ransom to threaten and demand voluntary

withdrawal of the suits taking advantage of the economic situation of the plaintiff ? (Appendix I)

7. Has not the case been reinstated by the District Court order of July 31, 1992, Denying Plaintiff's Motion for Reconsideration and Denying Defendants' Motion for Dismissal both in the same order, since the Defendants have not appealed the order denying dismissal ?

The petitioner respectfully requests the Honorable Court to allow time for oral argument in respect of the above questions.

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TABLE OF AUTHORITIES CITED.

CASES.

Cleveland Board of Education V Loudermill et al.,
Cited 45 CCH S.Ct.(petition 83-1362)

Dillion V United States
307 F .2d 445 a962 at 446.

E.E.O.C. V Univ. of Oklahoma
774 F .2d 999 (1985) (10th Cir)

Harcon Barge V D & G Boat Rentals
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Powell V Alabama
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Republic Underwriters Ins. Co,
910 F.2d 224,229 (5th Cir)

Sanchez V Standard Brand Inc.,

431 F .2d 456 (5th Cir)

Smith V Barney

112 S.Ct. 678-682 (1992)

Thomas Oglesby V Terminal

Transport Inc.

543 F .2d. 111 (1976) (5th

Cir)

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

October Term, 1993.

KALYANA RAMASWAMI
Petitioner.

Vs

1. TEXAS DEPARTMENT OF

HUMAN SERVICES.

2. FRANCIS SUDELA

3. VERNA MAINPRIZE

4. MARLIN JOHNSTON

Respondents.

PETITION FOR WRIT OF
CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

Petitioner, KALYANA RAMASWAMI, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit, denying the Appeal on its own Motion, on the summery judgement and dismissal order of the U.S. District Judge, Southern District of Texas, Houston Division, and the Denial of :

1. Appellant's Motion to supplement the records on appeal.
2. Motion for alternative method of designating the contents of Appendix on appeal and also
3. the Plaintiff Motion for the substitution of a counsel for proper prosecution of the case on appeal.

OPINIONS BELOW.

The unpublished written opinion of the U.S. Court of Appeals appears in Appendix A to this Petition. The U.S. Court of Appeals judgement order dismissing the appeal and the order denying the Appellant's individual Motions to supplement the records on appeal and for alternative method of designating the contents of Appendix on Appeal appear in Appendix B to this Petition. The Appendix C to the Petition contains the order of the U.S. Judge denying the Defendants' petition to dismiss the Title VII case on technical grounds. Appendix D includes all the four

orders of the District Court in this case which are at issue. The unpublished Memorandum and Recommendations of the Magistrate Judge adopted by the District Court for the Southern District of Texas, Houston Division appears in Appendix E.

Appendix F to this petition contain the Notice of Right to Sue issued by the Equal Employment Opportunity Commission, Section 706(f)(1) and (f)(3) of the Civil Rights Act as amended and charge of discrimination to the E.E.O.C.

Appendix I to the Petition are letters of June 28, 1990 and July 23, 1990 from the Attorney General of Texas with Motions for Plaintiff's Voluntary dismissal of the suit and Non-suit.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on August 9, 1993. After obtaining extension of time, a timely petition for rehearing was filed on August 31, 1993 along with the Motions for reconsideration of the Court order of August 9, 1993 on the Motion to supplement the Court records and Motion for alternative method of designating the contents of the Appendix. The Court of Appeal denial of the Petition for Rehearing was issued on September 15, 1993 and is set forth in Appendix G. In the same order the Appeals Court denied reconsideration of the Motions.

On Request, Stay of Mandate was issued up to and including November 5, 1993. Further stay of issue of mandate was denied on November 4, 1993.

This Court's jurisdiction is invoked under Title 28, U.S.C. S 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendments V, VII and XIV to the United States Constitution is set forth in Appendix H.

Section 706(f)(1) and (f)(3) of the Civil Rights Act 1964, as amended and provided along with the Notice of Right to Sue is part of Appendix F to this Petition.

STATEMENT OF THE CASE.

This Civil action was brought under Title Vii of the Civil Rights Act of 1964 for employment discrimination in the United States District Court for the Southern District of Texas, Houston Div. Jurisdiction was conferred by Title 48 United States Code, Section S2000e-5.

Texas Department of Human Services is a federally and state funded State Government social welfare Agency.

Petitioner was hired by the Agency as Financial Compliance Officer in April 1981 and within about two weeks was asked to take the additional job and responsibilities of Regional Budget Officer function with promise that the job would be

audited and additional monetary compensation would be provided. The Agency procedures require prompt pay revision for additional responsibilities When after repeated requests, the promise was not honored for nearly two years, Petitioner brought this matter to the knowledge of Respondent # 3, Superior of respondent #2 and filed a complaint on April 25, 1983, detailing the exploitation, discrimination and unfair employment practices of the Respondent #2. Immediately, Respondent #2 retaliated in every conceivable form until employment of Petitioner was terminated. The retaliatory practices included harassment, abuse, mental persecution, threats, intentional

suspension, denial of merit raise, false charges, warnings and suspension, impractical performance plan, unfavorable evaluation, coercion, extortion, illegal confinement. blowing cigarette smoke on the face, deprivation of right to position, denial of overtime benefits, vacation etc.,. Prior to complaint, Petitioner was awarded two step merit raise for excellence and outstanding performance. Complaints to respondent # 3, and the Head of the Agency (Respondent # 4) were not acted upon. Complaints to State Governor and State Attorney General got no response. Numerous in house complaints were not fully and fairly investigated.

On receipt of proposed termination of employment, Petitioner requested in writing that he should be allowed to present the facts to the Personnel Committee before determination, since due process was continuously denied. This request was made as per the U.S. Supreme Court ruling in Cleveland Board of Education Vs Loudermill, wherein it was ruled that Public employee should be allowed to be heard at the predetermina-tion personnel committee meetings in the interests of fair and equal presentation of facts as post determination hearing is not adequate. This specific request was denied. Post determination hearing convened at the request

and convenience of the Respondents themselves, dismissed the complaint without providing the requested information.
At that time, the State Agency was under consent agreement with the justice department for a prolonged period of time from 1978 to 1983 to remedy their Civil Rights policy and was also under a Court Order in 1984 to change the complaint policy to ensure that a definite timeframe is met and final reports on employee complaints are promptly issued.

A timely filed complaint with the Equal Employment Opportunity Commission (E.E.O.C.) was forwarded to the Texas Human Rights Commission at the personal request of the Director of the

Human Rights Commission, who kept the file for two years and returned to E.E.O.C. without any action after issuing a notice of Right to Sue in any State Court. E.E.O.C. kept the file for one more year without taking any action and dismissed the complaint after nearly three years as untimely. (APP. F -2). When proof of timely filing was provided E.E.O.C. refused to act.

Petitioner who filed the suit at the State and Federal Courts as PRO-SE, made request for counsel assistance which was not acted up on at the State Court.

When the Magistrate of the Federal Court learnt that the Petitioner, who had no legal knowledge was a victim of deception of the Defense

Counsel, (App.1) the Magistrate appointed a counsel for the Petitioner finding that a fair and meaningful hearing cannot be had without the aid of a counsel as substantial issue of facts needs to be presented in the manner required by Court.

The Court appointed counsel did not discharge the responsibility timely and the appointment did not also serve the intended purpose. (App. E. p. 21-22) The cause of justice and due process was only again denied to the petitioner. Additionally, the Defense Counsel had also dissuaded the Petitioner's Court appointed Counsel from discharging the responsibilities. As a result, the District Court Magistrate

recommended Summery Judgement even though the Pro-Se response to the Request for Admissions disputed every vital question with brief factual evidence. Adopting the Magistrate recommendations, the District Judge issued three orders in dismissing the case, which is the issue on appeal. (App. D 1 & 2, 3 & 4, 5 & 6).

When the Court orders were received, the Counsel did not take any action and informed the Appellant to take whatever action he wants take and also declined to pursue the case on appeal. When the Amended Court order of May 13. 1992 (App. D 5 & 6) was received the only logical conclusion was that it was in

response to the Plaintiff's April 14, 1992, Motion for reconsideration since no other papers or Motion was pending with the Court from the date of March 17, 1992 (App. D 1,2,3,4) orders except the Plaintiff Motion of April 14, 1992.

Notice of appeal was filed on June 5, 1992 and separately a request was made for appointment of a counsel stating that the court appointed counsel was not willing to pursue the issue further on Appeal. The District Court denied the Motion for Counsel on July 31, 1992 order (App. D 7,8, 9), after nearly two months. In the same order the Court also denied Plaintiff's Motion for Reconsideration of

April 14, 1992 giving raise to speculation as to the purpose of this order when the May 15, 1992 order has already addressed the issue.

The Defendants' May 15, 1992 Motion seeking dismissal was also denied in the same order thus not closing the case.

On receipt of the July 31, 1992 order

(APP. D 7,8,9), Petitioner filed a Motion to reconsider the decision denying the appointment of a counsel on August 13, 1992, which the Court of Appeals denied on November 4, 1992, after nearly three months.

In the Motion the Petitioner had stated that he has difficulties in understanding and

complying with the legal requirements for the proper prosecution of the case while the respondents have the mandatory defense of the State Attorney General.

Petitioner had also explained in detail as to how he was exploited by the defense counsel and stated that the denial of legal assistance now would defeat the purpose of earlier assistance and would legalize the Civil Rights violations of the State Government Agency.

The appeal preferred by the Petitioner has been denied by the Court of Appeals for the Fifth Circuit on its own Motion, as not timely as to the judgement dismissing the case and hence the

Court of Appeals claims that it has no jurisdiction to hear the Appeal.

The Court of Appeals contend that :

1. March 17, 1992 Order (APP. D 1,2,3,4) were final and appealable on March 17, 1992 and the appeal filed on June 5, 1992 is not timely as to March 17, Orders.

2. The May 13, 1992, Amended Order (App D 5 & 6) has no validity with regard to notice of appeal, since it reenters the judgement of prior order of March 17, 1992.

The Fifth Circuit has held that "[t]he mere fact that a court reenters a judgement or revises a judgement in an immaterial way does not affect the time within

which litigants must pursue an appeal. Rather, the test is 'whether the lower court, in its second order has disturbed or revised the legal rights and obligations which, by its prior judgement, had been plainly and properly settled with finality.'" Offshore Production Contractors, In. V Republic Underwriters Ins. Co., 910 F.2d.224,229 (5th Cir. 1990). In this case the amended order did not disturb or revise any of the rights of the parties. In Offshore Production Contractors, the rule was invoked to find jurisdiction; however, the rule itself is not outcome - dependent.

3. The notice of appeal of June 5, 1992 cannot be against the July

31,1992 order (APP D 7,8,9), since the order was not
entered on June 5, 1992.

4. The August 13, 1992 Motion for reconsideration of the appointment of counsel cannot be considered as appeal against the July 31, 1992 order (APP. 7,8,9) since it did not clearly evince an intent to appeal against that order and also the Motion was not served on the defendants. " If a document filed within the time specified by Rule 4 gives the notice, it is effective as a notice of appeal." Smith V Barry, 112 S.Ct. 678, 682 (1992).

The Court has also by a separate order (APP. B 3 & 4) denied Petitioner's :

1. Motion for substituting the Appellate Court records stating that they were not part of the findings at the district court below. and

2. Motion for alternative method of designating the contents of the Appendix as per FRAP rules as Moot.

In the Appellant's Motion to supplement the documents of the Appeals Court, the Petitioner had submitted to the Court that :

a. The Appellant submitted the Motion for alternative method of designating the contents of the Appendix along with the letter of October 15, 1992 to the Appellee on October 21, 1992.

The Appellant Motion was presented for ruling of the Honorable Court

on Nov. 2, 1992 and the Appellee had no objection.

2. As discovery requests were not made by and on behalf of the Appellant and the ruling of the district court was based on deemed admissions, it is essential that the documents listed in the Appendix Volume I & II (Exhibit A), which are the basis for the complaint (District Court Docket Instrument # 1) be and are part of the records of the appeal process and decision.

The Motion was presented to the Court for a ruling on January 4, 1993, and the Respondents opposed the Motion on the grounds that the documents proposed to be supplemented constitute evidence outside the record and reviewed

and considered by the Judge of the U.S. District Court and the supplemental material does not relate to or add clarity to any issue to be decided upon in this appeal. Appellant's motion to supplement is simply an attempt to have this court review the merits and facts of this case as if it were the trial court.

The Petitioner's Motion for rehearing submitted was also denied and the denial is part of the petition for Rehearing. (App. G - 2).

REASONS FOR GRANTING THE WRIT.

Certiorari should be granted for the following reasons.

The Petition filed under Title VII of the Civil Rights Act, presents an issue resolved by deemed admissions and assumptions by invoking rules of technical consideration ignoring the facts and factual evidence presented with documentation.

The Petitioner has no legal knowledge or expertise and hence cannot quote other Circuit Court rulings on the issue that conflicts with the ruling of the Fifth Circuit and the Supreme Court rulings.

However, some good faith effort has been made with limited

borrowed knowledge and request the Honorable Court to bear with and excuse any errors and mistakes.

In Sanchez V Standards Brands Inc., 431 F 2d. 456 (5th Cir), the same Fifth Circuit has determined that Procedural technicalities are not to stand in the way of Title VII of Civil Rights Act.

The Appeals Court has stated that Defendants -appellees ultimately moved for summery judgement (record instrument #11) and this Motion came before the Magistrate judge for report and recommendation. (App. A - 2). The Fifth Circuit ignored the fact the move was made after deception on the unsuspecting Petitioner. (App. E 10 and App. I.)

The Magistrate judge found that the defendants were "entitled to judgement as a matter of law because of the deemed admissions and the lack of sufficient response to Defendants' Motion. " The Magistrate or the Court of Appeals did not specify what constitute lack of sufficient response.

In Equal Employment Opportunity Commission V University of Oklahoma 774 F .2d 999 (1985) (10th Cir), Federal Civil Procedure Key 2610. " respect to motion for j.n.o.v., while scintila of evidence is insufficient to submit case to jury , trial court cannot deprive the non- moving party of jury determination unless it is certain

that evidence conclusively favours one party such that reasonable men could not arrive at contrary verdict. "

The highly disputed Request for Admissions and the two volumes of Appendixes submitted as part of the substituting the records of the Appellate Court proves that there was plenty of evidence to warrant a jury determination.

While invoking the Offshore Production Contractors Inc. V Republic Underwriter Ins. Co. rule (Supra), the Fifth Circuit did not explain why and how there was a need to reissue the Amended order unless it is for the Petitioner's motion for reconsideration

since there were no other documents pending with the Court from the March 17, 1992 order to May 13, 1992 order.

The Fifth Circuit invoked the Harcon Barge Co., Inc V D & G Boat Rentals Inc., 784 F .2d 665,667 (5th Cir) to determine whether the Plaintiff's Motion for Reconsideration brought on April 14, 1992 was brought under Fed.R.Civ.P 58 or 60. In the same case on 784 F.2d 670, the Fifth Circuit has admitted that Although on several other occasions the Fifth Circuit has dealt with the issue of whether a motion to rehear, reconsider, or amend a judgement should be considered as one made under Rule 59(e) or Under Rule 60, no definite rule has

developed. In such a situation should the Pro-Se Petitioner not get the benefit of doubt when there was so much factual evidence submitted to warrant a jury trial. Should the Fifth Circuit examine its own jurisdiction on its motion in such a situation ignoring due process and need for justice.

While considering whether the Petitioner's August 13, 1992 motion for reconsideration could be against the July 31, 1992 order (App. A 11,12) the Fifth Circuit invoked the Supreme Court ruling Smith V Barry, 112 S.Ct. 678, 682 (1982), the Fifth Circuit ignored the ruling in the same case that Courts will liberally constru requirements of rule governing

notice of appeal F.R.A.P. Rule 3, 28. U.S.C.A. So, long as such a document is filed within the time allowed by Rule 4 for a notice of appeal and satisfies Rule 3(c)'s requirements as to the content of such a notice, it may be treated as a "functional equivalent" of the formal notice demanded by Rule 3. Thus when the papers are "technically at variance with the letter of Rule {3], a court may nonetheless find that the litigant has complied with the rule if the litigant's action is functional equivalent of what the rule requires." Torres, Supra,487 U.S. at 316-317, 108 S.Ct. at 2408-2409. 112 S.Ct. 678, 680, 690 (1992). Thus the Motion for reconsideration for the

provision of counsel on appeal made on August 13. 1992 clearly evidences the intent to appeal in the Appeals Court and was also served on the defendants and the proof of the same was sent to Fifth Court of Appeals while requesting the timely filed Rehearing.

While Denying the request for appointment of a counsel the Fifth Circuit stated exceptional circumstances do not warrant provision of counsel.

In Dillon V United States 307 F .2d 445 (1962) at 446 it is stated " As this Court has pointed out appointment of counsel may sometimes be mandatory even in those areas in which the Sixth amendment does not apply. This is

true when circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaning hearing cannot be had without the aid of a counsel. "

The Petitioner's case under Title VII of the Civil Rights Act is exactly the same and the Civil Rights Act provides for Counsel. (App. F.12) In Powell V Alabama 287 U.S. October term 1932, the Supreme Court has stated in page 69 " The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by a counsel. Even the intelligent and educated layman has small and sometimes no skills in the science of law. He lacks

both the skill and knowledge to adequately prepare his defense even though he have a perfect one. He requires the guiding hand of a counsel at every step in proceedings against him. "

In Sanchez Vs Standards Brands Inc., 431 F .2d 455 (1970) (5th Cir) at 455. it is said, In an action under Title VII of the Civil Rights Act 1964, Private litigant's right of access to courts must be vigilantly protected; for if the courthouse door closes in his face, enforcement of the act ceases to exist.

Again in Sanchez at page 467, " in such a confrontation, surely Goliath should not be allowed to fell David with the help of a club

fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the merits of controversy. "

The Petitioner has not had due process of his complaint both at the District and Appeals Court levels. In Thomas Oglesby V Terminal Transport Company Inc., 543 F .2d 111 (1976) (5th Cir). " Every summery judgement against the plaintiff on his failure to properly respond to motion for summary judgement did not deprive him of Seventh Amendment Right to jury trial or his Fifth Amendment Right to, not to be deprived of property without due process of law.

In Postal Tel Cable Co. V Newport, Ky, 1918, 38 S.Ct. 566, 247 U.S. 464, 62 L Ed. 1215. It is stated that " The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. "

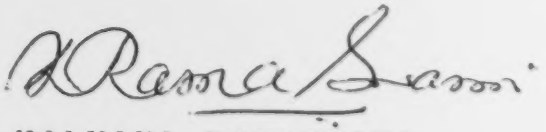
CONCLUSION

For the reasons set above, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals in this matter.

Dated: December 14, 1993.

Respectfully

Submitted,



KALYANA RAMASWAMI

PETITIONER - PRO-SE.

. U.S. COURT OF APPEALS
FILED
AUG 09,1993
RICHARD E WINDHORST JR.
CLERK.

IN THE UNITED STATES COURT OF

APPEALS.

FOR THE FIFTH CIRCUIT.

NO. 92-2464.

Summary Calender.

KALYANA RAMASWAMI

Plaintiff-Appellant.

Versus

TEXAS DEPARTMENT OF HUMAN SERVICES

ET AL.,

Defendants-Appellees.

Appeal from the United States

District Court for the Southern

District of Texas.

(CA -H -89-2163)

Before GARWOOD, SMITH, AND DEMOSS, Circuit Judges.*

PER CURIAM :

Plaintiff-Appellant Kalyana Ramaswami (Ramaswami) filed this action for employment discrimination against defendants-appellees Texas Department of Human Services and several officials thereof. Defendant-appellees ultimately moved for summery judgement (record instrument #11), and this motion came before the magistrate judge for report and recommendation.

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* Local Rule 47.5 Provides : " The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes

needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The magistrate judge found that the defendants were " entitled to judgement as a matter of law because of the deemed admissions and the lack of sufficient response to Defendants' motion. " The magistrate judge entered his recommendations on November 27, 1991 and Ramaswami filed objections on December 10, 1991. On March 17, 1992, the district court entered its order adopting the memorandum and recommendations of the magistrate judge and ordering " that

Defendants' Motions [sic] for summery judgement (Instrument # 11) is hereby GRANTED." The preamble in this order erroneously referred to the motion for summery judgement as " Defendant Time Insurance Company's" motion. The district court also entered as a separate document a final judgement dismissing the suit on that same date; this "final judgement" did not contain the erroneous reference to Time Insurance Company that was contained in the mentioned order adopting the magistrate's memorandum and recommendations.

On April 14, 1992, Ramaswami filed a motion for reconsideration of the March 17, 1992, order adopting the magistrate judge's

memorandum and recommendations. This motion made no mention of the reference to "Time Insurance Company" in the order. On May 13, 1992, the district court entered an amended order adopting the magistrate judge's memorandum and recommendations with the only change from the similar order of March 17 being the deletion of the reference to "Time Insurance Company." No new or different final judgement was entered, and no change was made in the "final judgement" entered March 17. On May 15, 1992, defendants filed a motion for dismissal under Fed. R. Civ. P. 12(b)(6). On June 5, 1992, Ramaswami filed a notice of appeal from the amended order entered on May 13, 1992. On that

same date, Ramaswami filed a motion for appointment of counsel on appeal. On July 31, 1992, the district court entered an order denying the motion for reconsideration, denying defendants' motion for dismissal and Ramaswami's motion for appointment of counsel.

On August 13, 1992 Ramaswami filed a motion to reconsider the denial of appointment of counsel in the district court. This court treated it as a motion for appointment of counsel on appeal and denied it on November 4, 1992.

This court must examine the basis for its jurisdiction, on its own motion , if necessary. Mosley v Cozby, 813 F.2d 659,660 (5th Cir. 1987). A timely notice of

appeal is a mandatory precondition to the exercise of appellate jurisdiction United States v Merrifield, 764 F. 2d 436, 437 (5th Cir. 1985).

The district court entered its final judgement under Fed. R. Civ. P. 58 dismissing Ramaswami's action on March 17, 1992. Ramaswami did not file a notice of appeal within thirty days of the entry of this judgement. See Fed. R. App. P. 4(a)(1). Ramaswami filed a motion for reconsideration on April 14, 1992. This motion cannot be construed as being brought under Fed. R. Civ. P. 59(e), because it was served more than 10 days after the dismissal. See Harcon Barge Co., Inc v D & G Boat Rentals Inc., 784 F.2d 665,

667 (5th Cir) (en banc), Cert. denied, 479 U.S. 930 (1986). The motion must be construed as being brought pursuant to Fed. R. Civ.P. 60. Such a motion does not suspend the running of the time for appeal. See Fed. R. Civ. P. 60(b); Fed. R. App. P. 4(a)(4).

On May 13, 1992, the district court issued an amended order adopting the magistrate judge's memorandum and recommendations. The district court did not, however, amend its judgement or enter a new judgement. On June 5, Ramaswami filed a notice of appeal from this amended order of May 13, 1992. This Court has held that "[t]he mere fact that a court reenters a judgement or revises a judgement in an immaterial way

does not affect the time within which litigants must pursue an appeal. Rather, the test is 'whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgement, had been plainly and properly settled with finality.'" Offshore Production Contractors, Inc. v. Republic Underwriters Insurance. Co., 910 F.2d 224,229 (5th Cir. 1990) (citations omitted). In this case, the amended order did not disturb or revise any of the rights of the parties. The amended order is substantially identical to the original order except that the incorrect reference to the Time Insurance Company was removed.

Moreover, there has never been any change in (or replacement of) the March 17, 1992, Rule 58 judgement. In Offshore Production Contractors the rule was invoked to find jurisdiction; however, the rule itself is not outcome- dependent. The amended order entered on May 13, 1992, did not in any way alter or replace the March 17, judgement, which was final and appealable on March 17, 1992. Therefore, Ramaswami's notice of appeal filed on June 5 was not timely as to the judgement dismissing his case, and this Court has no jurisdiction to hear an appeal of that judgement.

With respect to Ramaswami's April 14, 1992, Rule 60 (b), motion, the amended order of May

13, 1992 did not mention it, much less rule on it. The rule 60(b) motion was denied by an order of July 31, 1992. This order also denied Ramaswami's motion for appointment of counsel on appeal. Ramaswami's June 5, 1992 notice of appeal cannot be construed to appeal the denial of his Rule 60 (b) motion because it specifically referenced the May 1992, amended order, not the July 31, 1992, order (which had not been then entered).

" If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal. Smith v Barry, 112 S.ct. 678, 682 (1992). Ramaswami's August 13, 1992, motion for

reconsideration of the denial of appellate counsel does not comply with Rule 3 because it does not clearly evince an intent to appeal the denial of the Rule 60 (b) motion, nor has it been served on the defendants. Therefore, this Court is also without jurisdiction to hear an appeal from the denial of the Rule 60 (b) motion.

This Court is without appellate jurisdiction; accordingly, the appeal is

DISMISSED.

. U.S. COURT OF APPEALS
FILED
AUG 09,1993
RICHARD E WINDHORST JR.
CLERK.

UNITED STATES COURT OF APPEALS.

FOR THE FIFTH CIRCUIT.

NO. 92-2464.

Summary Calender.

D.C. Docket No. CA-H-89-2163.

KALYANA RAMASWAMI

Plaintiff-Appellant.

Versus

TEXAS DEPARTMENT OF HUMAN SERVICES ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, SMITH, AND DEMOSS, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs of the file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause is dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED that Plaintiff-Appellant pay to the Defendant-Appellees the costs on appeal to be taxed by the Clerk of this Court.

August 9, 1993

ISSUED AS MANDATE:

. U.S. COURT OF APPEALS
FILED
AUG 09,1993
RICHARD E WINDHORST JR.
CLERK.

IN THE UNITED STATES COURT OF APPEALS.

FOR THE FIFTH CIRCUIT.

NO. 92-2464.

KALYANA RAMASWAMI

Plaintiff-Appellant.

Versus

TEXAS DEPARTMENT OF HUMAN SERVICES ET AL.,

Defendants- Appellees.

Appeal from the United States District Court for the Southern District of Texas.

ORDER :

IT IS ORDERED that the motion of appellant to supplement the record on appeal is DENIED. The matters are not shown to have been part of the findings with the District Court below.

IT IS FURTHER ORDERED that appellant's motion for alternative method of designating contents of the appendix is DENIED as moot.

/s/ WILL GARWOOD

WILL GARWOOD

UNITES STATES CIRCUIT JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 6 1990
JESSE E CLARK, CLERK.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

KALYANA RAMASWAMI	)	
PLAINTIFF	)	CIVIL ACTION
Vs	)	
TEXAS DEPARTMENT	)	NO. H-89-2163
OF HUMAN SERVICES	)	
ET AL.,.	)	

ORDER

Pending before the Court is Defendants' Motion to Dismiss (Document # 2). The Court having considered the Motion and the brief in support, the response

(Document # 3), and the applicable law, is of the opinion that the defendants' motion should be denied.

Defendant Texas Department of Human Services ("TDHS") and individual defendants, Francis Sudela, Verna Mainprize, and Marlin Johnston ("individual defendants"), assert that they are entitled to be dismissed from this lawsuit pursuant to Rule 12(b)(1), of the Federal Rules of Civil Procedure, because the plaintiff failed to adhere to jurisdictional limitations placed upon him by Title VII, 42 U.S.C. 2000e et seq. Alternatively, the individual defendants seek dismissal on the ground that plaintiff failed to exhaust the administrative

procedures required by violation of Title VII as to them.

Pursuant to 42 U.S.C. S 2000e5(f), an employee who receives notice that the EEOC will not file a civil action on his behalf must file a law suit against his discriminating employer within 90 days after being issued a Notice of Right to Sue letter or be precluded from having a district court review his complaint. Bunch v. Bullard 795 F.2d 384, 387-388 (5th Cir.1986). The 90 day limitation rule is jurisdictional in nature, Prophet v. Armco Steel Inc., 575 F. 2d 579, 580 (5th Cir. 1978); therefore, if a plaintiff fails to file a civil action within the prescribed time, the defendant is

entitled to be dismissed from the action.

In the present suit, plaintiff received his Right to Sue Notice on March 30, 1989. He filed this lawsuit on June 26, 1989, well within the 90 day period. Defendants' Motion to dismiss on this ground is therefore denied.

Alternatively, the individual defendants claim that they are entitled to be dismissed from this action because they were not specifically named in the EEOC complaint as required by 42 U.S.C. S 2000e-5(f)(1). It is undisputed that plaintiff did not name the individual defendants in his EEOC charge. Plaintiff filed an EEOC charge only against his employer

TDHS. The individual defendants are administrators and employees of TDHS. In his complaint plaintiff alleged that he was discriminated against in retaliation for filing an in-house complaint against TDHS for the "policies of exploitation, of discrimination and of unfair employment practices" used at the TDHS. Though the individual defendants were not expressed named in the EEOC charge, the Court believes that dismissal at this time would be improper.

Filing a charge with the EEOC is a jurisdictional prerequisite or condition precedent to bringing a Title VII claim in district court. 42 U.S.C. S 2000e-5(f)(1); see Sanchez v Standard Brands Inc.

431 F 2d 455, 460 (5th Cir 1970); Daque v. Riverdale Athletic Association, 99 F.R.D. 325, 326 (N.D. Ga 1983); Wong v Calvin, 87 F.R.D. 145, 147 (N.D. Fl. 1980). "Thus a Plaintiff may not maintain an action against a defendant whom he has not previously named in a charge to the EEOC." Daque, 99 F.R.D. at 326. Several courts have recognized that this requirement serves two purposes. Daque, 99 F.R.D. at 326; Calvin, 87 F.R.D. at 147-148. First, the filing of the complaint affords the person charged with a violation notice of the allegations against him. Second, it affords an opportunity for the charged party to resolve the problem through conciliation

before being exposed to liability. Thus, where an individual defendant is not named in the EEOC complaint, he is ordinarily allowed to object because he has not had the opportunity to participate in the conciliation process. Daque, 99 F.R.D. at 326; Calvin 87 F.R.D. at 147-48. However, as the District Judge in Daque recognized,

> this rationale makes no sense where the objecting party is an officer which was charged in the EEOC complaint, and that party was responsible for the employment practices which resulted in the charge and had an opportunity to participate in the conciliation process. Where such persons had actual notice of the charge, and were involved or had an opportunity to be involved in the conciliation process, many courts have been unwilling to dismiss the

> action against them based solely on the technicality that they were not individually named in the EEOC charge.

Daque, 99 F.R.D. at 326 - 27. Here the individual defendants were "officers " of the party charged TDHS, they were allegedly responsible for the employment practices which resulted in the charge being filed and had an opportunity to participate in the conciliation process had they chosen to participate. This result comports with the purposes of the Act.

The Daque court found this functional approach, rather than purely technical approach, better serves the remedial purposes of the Act. Id. This Court is in agreement with the Georgia

approach and, although, the Fifth Circuit has not dealt with an issue precisely like the one presented here, it has recognized that courts should not dismiss an action based solely on mere technicalities. See Sanchez, 431 F 2d at 465 (Procedural technicalities are not to stand in the way of Title VII complaints ")

> " To dismiss the claims against these defendants based solely on the fact they were not named in the EEOC charge, without some showing of whether or not they had actual notice of the charge and an opportunity to participate in conciliation would be to elevate form over substance and ignore the remedial purposes of the Act "

Daque. 99 F.R.D. at 327.

The Court want to emphasize to the parties that the Court is not

expressing an opinion on to the merits of the plaintiff's claims, the Court is simply unwilling to dismiss plaintiff's claim at this stage based solely on technical grounds.

It is therefore ORDERED that Defendants' Motion to dismiss be, and is hereby, DENIED.

SIGNED at Houston, Texas, this 28th day of February, 1990.

/sd/ MELINDA HARMON

MELINDA HARMON

UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED. MAR 17, 1992.
JESSE E CLARK. CLERK.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS.

HOUSTON DIVISION.

KALYANA RAMASWAMI	$	
Plaintiff,	$	
Vs	$	CIVIL ACTION
TEXAS DEPT. OF	$	NO.H-89-2163
HUMAN SERVICES	$	
Defendant.	$	

ORDER ADOPTING MAGISTRATE'S MEMORANDUM AND RECOMMENDATION.

The court has reviewed the Magistrate's Memorandum and Recommendation regarding Defendant Time Insurance Company's Motion for Summery Judgement (Docket Instrument # 27) and all the objections thereto, and is of the opinion that said memorandum and

recommendations should be adopted by this Court. It is therefore

ORDERED, ADJUDGED and DECREED that United States Magistrate Judge Frances H Stacey's memorandum and Recommendation is hereby adopted by this Court.

In accordance with said Memorandum and Recommendation, it is hereby ORDERED that Defendants' Motions for Summery Judgement (Instrument #11) is hereby GRANTED.

The Clerk will enter this order and provide all parties with a true copy.

Signed this 16th day March, 1992 at Houston, Texas.

/sd/ JOHN D RAINEY.

JOHN D RAINEY

UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED. MAR 17. 1992.
JESSE E CLARK. CLERK.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS.

HOUSTON DIVISION.

KALYANA RAMASWAMI	$	
Plaintiff,	$	
Vs	$	CIVIL ACTION
TEXAS DEPT. OF	$	NO.H-89-2163
HUMAN SERVICES	$	
Defendant.	$	

FINAL JUDGEMENT.

For the reasons stated in the Court's Order of even date herewith, this action is dismissed.

THIS IS A FINAL JUDGEMENT.

The Clerk will enter this order and provide all parties with a true copy.

Signed this 16th day of March 1992 at Houston, Texas.

/sd/ JOHN D RAINEY.

JOHN D RAINEY

UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED. MAY 13, 1992.
JESSE E CLARK. CLERK.

IN THE UNITED STATE DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF

TEXAS.

HOUSTON DIVISION.

KALYANA RAMASWAMI	$	
Versus	$	CIVIL ACTION
TEXAS DEPT. OF	$	NO.H-89-2163
HUMAN SERVICES	$	

AMENDED ORDER

ADOPTING MAGISTRATE'S MEMORANDUM

AND RECOMMENDATIONS.

The Court has reviewed the Memorandum and Recommendation regarding the defendant's Motion for Summery Judgement (Docket Instrument #27) and all objections thereto, and is of the opinion that said memorandum and

recommendation should be adopted by this Court. It is therefore

ORDERED, ADJUDGED and DECREED that United States Magistrate Judge Frances H. Stacy's Memorandum and Recommendation is hereby ADOPTED by this Court.

In accordance with said Memorandum and Recommendation, it is hereby

ORDERED that Defendants' Motion for Summery Judgement (Instrument #11) is hereby GRANTED This Clerk of this Court shall provide a true copy of this order to all counsel of record.

Signed on May 12, 1992, at Houston, Texas.

/sd/ JOHN D RAINEY

JOHN D RAINEY

UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED. JULY 31. 1992.
JESSE E CLARK. CLERK.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS. HOUSTON DIVISION.

KALYANA RAMASWAMI	$	
Plaintiff,	$	
Vs	$	CIVIL ACTION
TEXAS DEPT. OF	$	NO.H-89-2163
HUMAN SERVICES	$	
Defendant.	$	

ORDER.

Pending before the Court is Plaintiff's Motion for Reconsideration of the Court's order Adopting Magistrate's Memorandum and Recommendation Regarding Defendant's Motion for Summery Judgment (Instru. #32),

Defendant's Motion for Dismissal (Instru. #34), Plaintiff's Motion for Appointment of an Attorney (Instru. #36). The Court having considered these Motions is of the opinion that

1) Plaintiff's Motion for Reconsideration of Magistrate's Memorandum and Recommendation Regarding Defendant's Motion for Summery Judgement should be DENIED;

2) Defendant's Motion for Dismissal should be DENIED; and

3) Plaintiff's Motion appointment of an Attorney should be DENIED.

It is therefore

Ordered, Adjudged and Decreed that the above three Motions should be DENIED.

The Clerk shall submit a true copy of this Order to all parties.

Signed on this 22nd day of July 1992, at Houston.

/sd/ JOHN D. RAINEY

JOHN D. RAINEY.

UNITED STATES DISTRICT JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED. NOV 27, 1991.
JESSE E CLARK, CLERK.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS.

HOUSTON DIVISION.

KALYANA RAMASWAMI	$	CIVIL ACTION
Vs	$	NO.H-89-2163
TEXAS DEPT. OF	$	JUDGE.
HUMAN SERVICES	$	JOHN D RAINEY

MEMORANDUM AND RECOMMENDATIONS.

Before this Court is Defendant Texas Department of Human Services, Francis Sudela, Regional Director, and Former Commissioner Marlin Johnston's Motion for Summery Judgement (Instrument #11) filed September 14, 1990, and referred by United States District

Judge John Rainey to United States Magistrate Judge Frances H Stacy on September 21, 1990, pursuant to Fed. R. Civ. P. 56(c). The Plaintiff, Kalyana Ramaswami ("Ramaswami"), did not timely file a supplemental response to the Defendants' ("TDHS") Motion. After considering the pleadings on file, argument of the parties, and relevant law, the Court RECOMMENDS that TDHS' Motion be GRANTED.

I. STATEMENT OF FACTS.

Ramaswami brought this action under Title VII of the Civil Rights Act of 1964 for employment discrimination. Jurisdiction is conferred by 48 U.S.C. S 2000 e.

TDHS hired Ramaswami in April 1981, as Financial Compliance

Officer. Shortly, thereafter, he was asked to take over the responsibilities of Regional Budget Officer. Ramaswami claims that TDHS promised that his job would be audited for the additional responsibilities and he would receive more pay. Ramaswami claims that TDHS took no action to fulfil these promises for about two years and thus, he was exploited and subjected to discrimination. Ramaswami brought this matter to his supervisor and filed a complaint on April 25, 1983, detailing the alleged discriminatory and unfair employment practices.

Ramaswami claims that TDHS retaliated against him which lead to more complaints, which lead to

more retaliation, ultimately resulting in his termination on August 15, 1985. In June 1986, Ramaswami filed complaints with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights. He claimed he was discriminated against because of his Hindu religion, Indian Origin and in retaliation for filing an in-house complaint due to TDHS' policies of exploitation, discrimination and unfair employment practices. On March 30, 1989, the EEOC determined that Ramaswami's charge was untimely filed with the EEOC. Accompanying this was the Notice of Right to Sue.

On April 15, 1988, Ramaswami filed suit *pro se* in the 280th

Judicial District Court of Harris County, Texas, Cause No-88-021721, and requested appointment of counsel. TDHS served a Request for Admissions on Ramaswami on March 9, 1990. He filed his response on June 22, 1990. These Request for Admissions and the responses were filed in the State Court.

In the mean time, on June 26, 1989, Ramaswami had filed a second *pro se* suit in federal court, which is the case at bar, Civil Action H-89-2163. At that time the state case was still pending. TDHS apparently served an identical Request for Admissions to Ramaswami in the federal case, also on March 9, 1990.

The state court granted a Motion for non-suit in October 1990.

TDHS filed a Motion for Summery Judgement on September 14, 1990. By that time it had not received Ramaswami's Response to the Request for Admissions filed in the federal court. Ramaswami never communicated with TDHS, requesting an extension, nor petitioned this Court for an extension to file a response to the Request for Admissions in federal court.

II. SUMMERY JUDGEMENT.

Summery judgement is proper when pleadings and evidence on file, along with affidavits, show that (1) there is no genuine issue as to any material fact and

(2) the moving party is entitled to a judgement as a matter of law. Fed. R. Civ. P. 56(c). The substantive law determines which facts are material. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the facts, and the inferences to be drawn from them, in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)

TDHS, as the moving party, has the burden to show that no genuine issue of material fact exists. If this burden is successfully discharged by TDHS, then the burden shifts to Ramaswami, the non-movant, to counter TDHS' evidence with proof

that a genuine issue exists for trial. *Celotex Corp. v Catrett,* 477 U.S. 317, 323 (1986).

III DEEMED ADMISSIONS.

It is clear from the record that Ramaswami erroneously believed that filing his response in state court would be sufficient for the Request for Admissions filed in both state and federal courts. Under the Federal Rules of Civil Procedure, each of TDHS' request is deemed admitted unless, within 30 days after service of the request, or within a time as the court may allow, Ramaswami served TDHS with his response. Fed. R. Civ. P. 36(a). Because Ramaswami was served with the Request on

March 9, 1990, his response was due on April 8, 1990. Id. Ramaswami argues that TDHS has the necessary information regarding its Request because he responded in the state court. Nevertheless, Ramaswami overlooks the fact that the Texas Rules of Civil Procedure parallels the Federal Rules in this instance. Thus the state rules also require that each of the matters is deemed admitted unless, within 30 days after service of the request or within a time designated by the court, the recipient answer or object. Tex. R. Civ. P. 166(b) and 169.

Ramaswami's failure to respond within the prescribed time in either court has the effect of

deeming the requests admitted. Ramaswami alleges that he was operating under misguidance by counsel for TDHS. Ramaswami was under the mistaken assumption that by taking a non-suit in state court he would be " transferring " in *toto* that case to federal court where the same action was pending. Even if there were true, Ramaswami would be carrying into federal court a set of past-due responses. Ramaswami received both sets of Request for Admissions on March 9, 1990. There were due on April 8, 1990. Ramaswami did not file his response until June 22, 1990, and then only in the state claim. In addition, even if Ramaswami conducted his legal matters based on 'advice' from counsel for TDHS,

he did so after he filed his late response. The damage was already done.

Therefore, the following facts are deemed admitted by Ramaswami :

Request No. 8 :

Admits that Francis Sudela never promised Plaintiff monetary compensation for Plaintiff's duties of assisting the Budget Coordinator.

Request No. 14 :

Admits that DHS Region 11 began receiving complaints about Plaintiff's work performance in January 1993.

Request No. 15 :

Admits that from April 1983 to August 1985, Francis Sudela

assisted Plaintiff in dealing with his job performance problems.

Request No. 21 :

Admits that from December 1984 to August 1985, Plaintiff was compensated at level 17 although he never performed any of the automation responsibilities on which the higher classification level was based.

Request No. 22 :

Admits that in April 1983, Plaintiff received a memo from Francis Sudela informing him that his job performance was unacceptable.

Request No. 24 :

Admits that Plaintiff initiated no complaints regarding DHS or any of its employees prior to April 25, 1983.

Request No. 25 :

Admits that the overall rating of Plaintiff's performance evaluation for the period March 1, 1983 to March 1, 1984, was that Plaintiff did not meet the requirements of his job.

Request No. 28 :

Admits that Plaintiff was placed on a corrective action plan on August 29, 1984.

Request No. 31 :

Admits that Plaintiff was recommended for probation on January 3, 1985.

Request No. 32 :

Admits that Plaintiff was placed on probation in February 1985.

Request No. 35 :

Admits that Plaintiff was suspended for 3 days on April 29, 1985, for work rule violations.

Request No. 37 :

Admits that Francis Sudela informed Plaintiff that his written comments regarding the dismissal recommendation would be a part of Defendants' recommendation and would be reviewed by state office staff who would act on the dismissal recommendations.

Request No. 38 :

Admits that Plaintiff's employment with the Texas Department of Human Services was terminated for violation of work rules # 9 and # 31.

Request No. 39 :

Admits that Plaintiff did not show up for a grievance hearing regarding his employment dismissal which was held in March 1986.

Request No. 40 :

Admits that Plaintiff was unwilling to accept job direction or assistance.

Request No. 41 :

Admit that Plaintiff would not perform his assigned tasks.

Request No. 42 :

Admits that Plaintiff was not retaliated against for filing internal Department of Human Services Complaints.

Request No. 43 :

Admits that Plaintiff's internal Texas Department of Human Services

complaints were fairly investigated.

Request No. 44 :

Admits that Plaintiff's internal Texas Department of Human Services complaints were fully investigated.

Request No. 45 :

Admits that Plaintiff never witnessed nor had knowledge of any alleged violations of law made by Department of Human Services employees.

Request No. 46 :

Admits that Plaintiff never brought these alleged violations of law to the attention of any Department of Human Services Authority.

Request No. 47 :

Admits that Plaintiff has not been damaged as a result of the allegations in his petition.

Request No. 48 :

Admits that Plaintiff has not been harassed by the Department of Human Services or any of its employees.

Request No. 50.

Admits that Plaintiff has not been discriminated against by the Department of Human Services or any of its employees on the basis of his national origin.

Request No. 51 :

Admits that Plaintiff has not been discriminated against by the Department of Human Services or any of its employees on the basis of his religion.

Request No. 52 :

Admits that Plaintiff has not been discriminated against by the Department of Human Services or any of its employees on the basis of his age.

Request No. 53 :

Admits that Plaintiff has not been retaliated against by the Department of Human Services or any of its employees.

Request No. 54 :

Admits that Plaintiff was not exploited by the Department of Human Services or any of its employees.

Request No. 55 :

Admits that Plaintiff was treated fairly during the entire length of his employment with the Department of Human Services.

Request No. 56 :

Admits that Plaintiff's employment termination from the Department of Human Services was a direct consequence of his own behavior.

Request No. 57 :

Admits that the allegations in Plaintiff's complaint have no basis in fact.

Request No. 58 :

Admits that Plaintiff's reputation has not been harmed.

Request No. 59 :

Admits that Plaintiff's clean work record has not been intentionally tarnished.

Request No. 60 :

Admits that Plaintiff's right to work has not been deprived.

Request No. 61 :

Admits that Plaintiff has not suffered humiliation.

Request No. 62 :

Admits that Plaintiff has not suffered mental stress.

Request No. 63 :

Admits that Plaintiff has not suffered severe emotional and other illness requiring medical treatment and expense.

IV. LACK OF RESPONSE TO DHS MOTION.

After TDHS filed its motion for Summery Judgement, Ramaswami filed his Motion for Continuance and brief in support. Both these instruments were filed *pro se*. The Court took no action at that

time on TDHS' Motion because it was abated pending further response by Ramaswami's counsel, Constance Y. Singleton, who was appointed on October 29, 1990. (Instrument # 18)

Attorney Singleton initially was given until November 30, 1990, to file a Supplemental Response to the pending motion for Summery Judgement. (Instrument # 16). Because of extended illness of Ramaswami's newly appointed counsel the Court sua sponte extended the filing deadline for the Supplemental Response to September 30, 1991 (Instrument # 23). Later this date was extended to November 7, 1991 (Instrument # 25). Next, United States Magistrate Judge Frances

Stacy orally granted an extension until November 12, 1991, at attorney Singleton's request. Finally, ' Plaintiff's response to Defendant's Motion for Partial Summery Judgement' (sic) was filed on November 13, 1991, one day late (Instrument # 26).

Ramaswami had the ultimate burden of persuasion on his Title VII claim. He has failed to come forward with any evidence sufficient to defeat TDHS' Motion for Summery Judgement.

This Court finds there is no genuine issue of material fact as to why Ramaswami was terminated from TDHS because of the deemed admissions. Further, TDHS is entitled to judgement as a matter of law because of the deemed

admissions and the lack of sufficient response to Defendants' Motion.

V. CONCLUSION.

For the foregoing reasons, it is RECOMMENDED that Texas Department of Human Services, Francis Sudela, and Marlin's Motion for Summery Judgement be GRANTED.

The Clerk shall file this instrument and mail a copy to all parties. Within 10 days after being served with a copy, any party may file written objections pursuant to 28 U.S.C s. 686 (b) (1) (C), General Order 80 -5, S.D. Texas. Failure to file objections within such period shall bar an aggrieved party from attacking factual finding on appeal.

Nettles v Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc); *Ware v King,* 694 F. 2d. 89 (5th Cir. 1982); *Thomas v Arn,* 106 S.ct.466 (1985). The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208, and a copy shall be delivered to the Chambers of Judge Rainey, Room 8613 and to the Chambers of Judge Stacy, Room 7525.

Signed at Houston, Texas, this 22nd day of November 1991.

sd/ Frances H Stacy./

FRANCES H STACY

UNITED STATES MAGISTRATE JUDGE.

EQUAL EMPLOYMENT OPPORTUNITY

COMMISSION.

NOTICE OF RIGHT TO SUE.

(Dismissal)

FROM :

Equal Employment Opportunity

Commission.

Houston District Office,

405 Main Street, 6th Floor,

Houston, Texas- 77002.

To

Mr. Kalyana Ramaswami,

14802 Payette Drive,

Houston, Texas - 77040.

CHARGE NO. 064 86 2303

EEOC REPRESENTATIVE. T.L. Houston

Enforcement Supervisor.

PHONE NO : (713)-653-3442.

(See Section 706(f)(1) and(f)(3)

of the Civil Rights Act of 1964

and the additional information on the reverse of this form.)

TO THE PERSON AGGRIEVED.: This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

[_] No jurisdiction for the following reason, and therefore the Commission has no authority to process your charge further.

[X] Your charge was untimely filed with the Commission, i.e., you waited too long from the date of the action(s) of which you complained to file your charge and it was therefore outside the time prescribed by law. Therefore, the Commission cannot investigate the

allegation(s) contained in your charge.

[_] The Commission has determined that you did not allege or otherwise demonstrate that you were directly affected by the practice described or effectively deterred from acting because of the practice.

[_] Respondent employs less than 15 employees.

[_] Others (briefly state)-------

[_] No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

[_] You failed to provide requested necessary information, failed or refused to appear or be available for necessary

interviews/conferences or otherwise refused to cooperate to the extent the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

[_] The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

[_] The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days has expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the

Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

On behalf of the Commission.

/sd/ JIMMY E JANSEN

3/30/89. For Harriet Joan Ehrlich.

(DATE) District Director.

TYPED NAME AND TITLE

OF COMMISSION OFFICIAL.

cc: (to respondent)

Texas Department of Human Resources.

SECTION 706(f)(1) AND (f)(3) OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED STATES :

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to

secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving government, governmental agency or political subdivision. If a charge filed with the Commission pursuant to subsection(b) is dismissed by the Commission, or if, within one hundred eighty days from the filing of such charge or the

expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a Civil action in a case involving government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving government, governmental agency, or political subdivision shall so notify the person aggrieved and within ninety days after giving such notice a civil action may be brought against the respondent named in the charge:

(A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant or may authorize the commencement of the action without the payment of the fees, costs or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving the government, governmental agency, or political subdivision, to intervene in such civil action

upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(f)(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment

practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of tile 28 of the United States States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in

which the action might have been brought.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown.

ATTORNEY REPRESENTATION :

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C.2000e-5(f)(1) provides that the U.S. District Court having jurisdiction in your case may, at its discretion, assist you in obtaining a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it

requires. Your request to the U.S. District Court should be made well in advance of the end of the 90 day period mentioned above.

You may contact the EEOC representative named if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

DESTRUCTION OF FILE :

Generally, EEOC's rules call for your charge file to be destroyed after 1 year from the date of this Notice for a determination of no cause (and six months for other types of dismissals listed herein) unless

you have notified us that you have filed suit in Federal District Court. If the Commission has been notified that you have filed suit, your file will be preserved for use in your litigation, which could be important to your suit.

If you file suit, you or your attorney should forward a copy of this form and your court complaint to this office within 10 days after you file suit. Receipt of this evidence that you have filed suit will cause your file to be preserved and allow the Commission to consider your suit when taking other actions.

IF YOU FILE SUIT, YOU OR YOUR ATTORNEY SHOULD NOTIFY THIS OFFICE WHEN LAWSUIT IS RESOLVED.

CHARGE OF DISCRIMINATION.

This form is affected by the Privacy Act 1974; See Privacy Act Statement on the reverse before completing this form.

ENTER CHARGE NUMBER.

[_] FEPA

[X] EEOC 064862303.

STATE AND LOCAL AGENCY, if any.

Texas Commission on Human Rights and EEOC

NAME	HOME TELEPHONE
Kalyana Ramaswami	(713)-896-9155

ADDRESS.

14802 Payette Drive,

CITY, STATE AND ZIP CODE	COUNTY
Houston, Texas - 77022.	Harris

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR

LOCAL GOVERNMENT AGENCY WHO

DISCRIMINATED AGAINST ME.

NAME

TEXAS DEPARTMENT OF HUMAN

RESOURCES

STREET ADDRESS

1300 East, 40th Street,

CITY, STATE AND ZIP CODE.

Houston, Texas - 77022.

NUMBER OF EMPLOYEES/MEMBERS.

Over 15

TELEPHONE NUMBER.

(713)-692-3236.

CAUSE OF DISCRIMINATION BASED ON.

[_] RACE [_] Color [_] SEX

[X] RELIGION [X] RETALIATION.

[X] NATIONAL ORIGIN [_] AGE

[_] OTHER (specify)

DATE MOST RECENT OR CONTINUING

DISCRIMINATION TOOK PLACE.

August 15, 1985.

THE PARTICULARS ARE :

I. I believe that I have been discriminated against because of my religion, Hindu; my national origin, Indian, and in retaliation for filing an in-house complaint against Respondent for his policies of exploitation, discrimination and unfair employment practices.

II. Respondent claimed that I was discharged because of my job performance. No reason was given for the harassment and retaliation.

III. I know that my treatment stemmed from my complaint because Respondent continually harassed me from the time that I filed my grievance until I was terminated.

Specifically, my staff assistant was removed, my performance ratings were made poor, and my job responsibilities were increased. I was the only Indian, the only Hindu. The foregoing leads me to believe that Respondent was biased towards me.

RECEIVED

JUN 3, 11.31 AM '86

HOUSTON DISTRICT OFFICE

EEOC

[_] I also want this charged filed with the EEOC.

I will advise the agencies if I change my address or telephone. and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

/sd/ K. RAMASWAMI.

Charging Party (Signature).

NOTARY - (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF THE COMPLAINANT.

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE.

Day, Month and Year.

. U.S. COURT OF APPEALS
FILED
SEP 15,1993
RICHARD E WINDHORST JR.
CLERK.

IN THE UNITED STATES COURT OF APPEALS.

FOR THE FIFTH CIRCUIT.

NO. 92-2464.

KALYANA RAMASWAMI

Plaintiff-Appellant.

Versus

TEXAS DEPARTMENT OF HUMAN SERVICES ET AL.,

Defendants- Appellees.

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING.

(September 15, 1993)

Before GARWOOD, SMITH AND DEMOSS, Circuit Judges.

PER CURIUM :

IT IS ORDERED that the petition for rehearing and petition for reconsideration filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/S/ WILL GARWOOD

United States Circuit Judge.

REHG - 4

CLERK'S NOTE

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

AMENDMENTS V, VII AND XIV
TO THE UNITED STATES CONSTITUTION.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor

shall private property be taken for public use, without just compensation.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV.

Section. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE ATTORNEY GENERAL.

OF TEXAS.

JIM MATTOX June 28, 1990.

ATTORNEY GENERAL

Kalyana Ramaswami

14802 Payette Drive,

Houston, Tx 77040

Dear Mr. Ramaswami,

I have enclosed for your signature, the documents that you need to file in State and Federal Court dismissing your case, as per our agreement on June 24, 1990.

Once I receive notice that these documents have been filed by you within 10 days of your receipt, I will return your check for $500.00 to you.

As we discussed, you can refile your lawsuit should you obtain assistance from an attorney.

Should you change you mind and decide not to sign and file these documents, I will proceed with the contempt proceedings we had discussed.

Sincerely.

/sd/ Dennis Garza

DENNIS R GARZA
Assistant Attorney General.
P.O. Box 12548,
Austin, Texas- 78711.
(512)-463-2120.

IN THE UNITED STATES

DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF

TEXAS, HOUSTON DIVISION.

KALYANA RAMASWAMI	$	
	$	
Vs	$	CIVIL ACTION
TEXAS DEPARTMENT OF	$	NUMBER
HUMAN SERVICES	$	
FRANCIS SUDELA	$	CA-H-89-2163
MARLIN JOHNSTON	$	

PLAINTIFF'S UNOPPOSED MOTION

FOR VOLUNTARY DISMISSAL.

TO THE HONORABLE JUDGE OF

THE SAID COURT :

COME NOW, Plaintiff, in the above styled and numbered cause and file this his Dismissal of Plaintiff's claim in the above

styled and numbered cause of action.

In support thereof, the Plaintiff represents to the Court that he no longer desire to prosecute this case in the above styled and number cause.

Defendants do not oppose this Motion.

Respectfully submitted,

KALYANA RAMASWAMI
Plaintiff Pro Se

IN THE 280TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY.

KALYANA RAMASWAMI	$	
	$	
Vs	$	CASE NO :
TEXAS DEPARTMENT	$	88-021721
OF HUMAN SERVICES	$	
ET AL.,.	$	

PLAINTIFF'S MOTION FOR NON-SUIT.

TO THE HONORABLE JUDGE OF SAID COURT :

Kalyana Ramaswami, Plaintiff no longer desires to prosecute his suit against Defendants, Texas Department of Human Services, Francis Sudela, Verna Mainprize and Marlin Johnston

WHEREFORE, Plaintiff, Kalyana Ramaswami requests this Court to enter an order to non-suit.

Respectfully Submitted

KALYANA RAMASWAMI
Plaintiff, - Pro Se.

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

July 23, 1990

Kalyana Ramaswami
14802 Payette Drive,
Houston, Tx - 77040

Re : Voluntary Non-suit.

Dear Mr. Ramaswami,

In order to expedite the litigation of Ramaswami V Texas Department of Human Services, No. 88-021721 in the 280 th Judicial District Court of Harris County, Texas, we are enclosing a copy of Plaintiff's Motion for Non-suit.

As per our telephone conversation of July 20, 1990 and your Answer to Defendant's Motion for Dismissal or Alternatively Motion for Sanctions, You expressed a desire to transfer your State action to federal Court. At this

time you have filed suit in the U.S. District Court for the Southern District of Texas, Houston Cause No.H-89-2163.
A transfer of your State action to this federal court would create two suits of the same subject matter filed in the same court, which would later have to be consolidated.
Enclosed is another copy of a Motion for Non-suit in State court. Again non-suiting your State action will have the effect of a transfer to federal court since you have already filed suit in federal Court.

Sincerely,

/sd/ DENNIS GARZA

DENNIS R GARZA
ASSISTANT ATTORNEY GENERAL
P.O. Box 12548, Austin,Tx-78711